THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

* * * * *

LISA TORREY, et al	*	NO. 5:17-CV-190-RWS
	*	Texarkana, Texas
VS.	*	
	*	
INFECTIOUS DISEASES	*	10:00 a.m. - 10:45 a.m.
SOCIETY OF AMERICA, et al	*	February 5, 2020

* * * *

SCHEDULING CONFERENCE

BEFORE JUDGE ROBERT W. SCHROEDER, III
UNITED STATES DISTRICT JUDGE

* * * *

Proceedings recorded by computer stenography
Produced by computer-aided transcription

EDWARD L. REED
9251 Lynne Circle
Orange, Texas 77630 * 409-330-1605

APPEARANCES:

For the Plaintiffs:

MR. EUGENE R. EGDORF
Shrader & Associates, LLP
3900 Essex Lane, Suite 390
Houston, TX 77027

MR. RYAN HIGGINS
Rusty Hardin & Associates, LLP
1401 McKinney, Suite 2250
Houston, TX 77010

MR. LANCE LEE
Attorney at Law
5511 Plaza Drive
Texarkana, TX 75503

For IDSA and Individual Doctors:

MR. ALVIN DUNN
Pillsbury Winthrop Shaw Pittman, LLP
1200 Seventeenth Street, NW
Washington, DC 20036

For Blue Cross & Blue Shield:

MS. SARAH J. DONNELL
Kirkland & Ellis, LLP
300 N. LaSalle Street, Suite 2400
Chicago, IL 60654

For Aetna, Inc.:

MR. EARL B. AUSTIN
Baker Botts, LLP
30 Rockefeller Plaza Street
New Your, NY 10112-4498

MS. JENNIFER H. DOAN
MR. J. RANDY ROESER
Haltom & Doan
6500 Summerhill Road, Suite 100
Texarkana, TX 75503

APPEARANCES (Continued):

For Anthem, Inc.:

MR. MICHAEL J. TUTEUR
Foley & Lardner, LLP
111 Huntington Ave., Suite 2600
Boston, MA 02199

MS. EILEEN R. RIDLEY
Foley & Lardner, LLP
555 California St., Suite 1700
San Francisco, CA 94104-1520

For United Healthcare Services, Inc.:

MR. BENJAMIN F. HOLT
Hogan Lovells US, LLP
555 Thirteenth St., NW
Washington, DC 20004

MR. PATRICK C. CLUTTER, IV
Potter Minton, P.C.
110 N. College Ave, Suite 500
Tyler, Texas 75702

Courtroom Deputy:

BETTY SCHROEDER

Court Reporter:

EDWARD L. REED

P R O C E E D I N G S

10:00 A.M. - FEBRUARY 5, 2020

THE COURT: Mrs. Schroeder, call the case for us.

COURT CLERK: Cause No. 5:17-CV-19, *Lisa Torrey, et al vs. Infectious Diseases Society of America, et al.*

THE COURT: Announcements for the record?

MR. LEE: Your Honor, Lance Lee, Ryan Higgins, and Gene Egdorf on behalf of the plaintiffs.

THE COURT: Good morning. Welcome.

MS. DOAN: Your Honor, Jennifer Doan, Earl Austin, and Randy Roeser for Aetna, and we're ready to proceed, Your Honor.

THE COURT: Good morning. Welcome.

MR. HOLT: Good morning, Your Honor. Benjamin Holt, and with me is Patrick Clutter, on behalf of United Health.

THE COURT: Good morning.

MR. TUTEUR: Good morning, Your Honor. Michael Tuteur and Eileen Ridley on behalf of Anthem.

THE COURT: Hello.

MS. RIDLEY: Good morning.

MR. DUNN: Good morning, Your Honor. Alvin Dunn on behalf of IDSA and its doctor defendants.

THE COURT: Good morning, Mr. Dunn.

MS. DONNELL: Sarah Donnell on behalf of Blue Cross and Blue Shield.

THE COURT: Hi.

Welcome to everybody. Thanks for being here. We stayed this case back in September through the end of the year for a number of reasons, and then toward the end of the year the parties agreed that the stay would be continued -- or asked for the stay to be continued into February. The Court granted that motion and stayed the case through Valentine's Day and set a Scheduling Conference for today and requested that the parties meet and confer to discuss what remains to be done in the case to get remaining discovery completed and the case back on track. Since then, I know that a number of the parties have reached agreement -- or a number of defendants have reached agreements with respect to their continued involvement in the case. I do know the parties have met and conferred on a number of issues they wish to raise today, including the case schedule trial time, the requested independent medical examinations. I guess that's the only two major issues.

So we've got a number of things to discuss. Don't have any particular preference about how we proceed. If the plaintiffs want to go first,

I'll be glad to hear whatever you had to say.

MR. EGDORF: May it please the Court, Your Honor. Gene Egdorf for the plaintiffs. And Judge, I did want to let you know that Mr. Dutko, he's arguing in the Fifth Circuit today and so that's why he's not present today.

It seems like perhaps the first issue to discuss and the major issue to discuss is the schedule of the case. And as you, I'm sure, saw with what we filed, the parties conferred, we were able to reach an agreement regarding what you would call the typical case schedule that we thought made some sense, try to get all the documents produced from the parties, since that hasn't been completed yet, take the party depositions. You know, there may be additional depositions of the defendants. As the Court may recall, we're not limited to just a corporate rep. If the documents and depositions require, we might be able to depose some additional fact witnesses from each of the defendants.

So we set up a schedule to allow all that to happen first. You know, recognize that there are issues with scheduling the IMEs and put a date in for that and experts and so forth and agree to a trial date. And we were able to agree to everything in that

schedule, except I don't know if I call it a disagreement, but we kind of have a different view as to how long the trial should take. I think the defendants asked for 30 days and we suggested 15 to 20. And to be quite candid, Your Honor, some of that was based on my experience and knowledge with the Court that I'd be surprised if we were going to have 30 days for a trial. And so we think that it certainly can be done shorter than that.

So, in one sense, you know, we're kind of all set. We have an agreed schedule and we can all go do that.

The defendants, however, have asked for this bifurcation proposal where they want you to address this agreement issue first, have that go on until close to the end of this year. You know, and then if you rule against the defendant, then we would do all these other things. And they posit that that would be more efficient and so forth.

And, you know, I'm not a Yankees fan, so I hate to quote Yogi Berra, but it feels like it's "deja vu all over again." You know, two years ago it was you're going to grant our motions to dismiss, so let's not do any discovery at all, and that's not what happened.

THE COURT: Was there a request for bifurcated discovery before?

MR. EGDORF: Specifically, no, Your Honor, but there was a request that you rule on dispositive motions before any discovery took place. So, you know, I would suggest that this is sort of a repackaging of the way they wanted to do it before.

And I think what's really telling here, Your Honor, what's really important is, even the dates they have belie the notion that this is for efficiency. They propose a hearing on their summary judgment in October. If you look at the lengthy or the typical case schedule, I would have all of my experts designated by October. This case will actually take longer and cost more money if we do this bifurcated proposal. The whole notion of the bifurcated proposal for them is on the assumption that they are going to win their summary judgments. This isn't efficient. This case will drag on, we would be in trial many months later than what is agreed to by the standard case schedule.

So I don't really see how it promotes efficiency. I don't see how it saves costs. I certainly don't think we nor the Court is going to operate under the assumption that they are going to

win a motion because that's the only basis that their motion would make sense is an assumption they are going to win.

And I recognize, you know, there has been a stay, but even if you set aside the stay, this case has gone on and gone on and gone on. And to have further delay to us doesn't seem to make sense. We operated on an agreed schedule before. If they really thought there should have been bifurcated discovery, then they should have suggested that back in 2018 before they deposed nearly all of our plaintiffs, which of course would have had nothing to do with their bifurcated plan, before our plaintiffs produced their documents, their damages documents. We've already had to do those things. So I really don't see how it promotes efficiency other than promoting their agenda that they think you are going to grant a motion.

Now, I can move on and talk about some of the other issues if you would like me to or we can just stop here and have them respond. However you want to go, Judge.

THE COURT: Let me hear from the defense.

MR. EGDORF: Oh, I think Mr. Lee thinks I omitted something, so if you don't mind one second, Your Honor.

(Conferring with co-counsel)

Mr. Lee did correct me. We did have a little bit of discovery we were allowed to do during the pendency of the motions to dismiss. We had that four-year limitation. But generally, we didn't have the full-fledged discovery like you would ordinarily have.

THE COURT: Thank you.

MR. HOLT: Good morning, Your Honor. Benjamin Holt on behalf of the United Health defendant, and I'm going to speak now about the schedule on behalf of all the defendants. Some of my colleagues may want to chime in separately on that.

THE COURT: Okay.

MR. HOLT: I want to give you a little bit of thinking on the bifurcation proposal, but first, I want to address the date issue that Mr. Egdorf raised. The schedule we proposed was attempting to build in as much time as we thought the plaintiffs might need to take the discovery that they would want on the agreement issue, and we also built in a couple months for expert discovery in the event they wanted to have an expert on that issue. In the meet-and-confer, it didn't get to the point of whether they would want that or not, and so the schedule actually could be compressed even more.

The crux of the schedule that we've proposed really is that you get through the remaining discovery of defendants, which would be almost exclusively of defendants, on the issue of agreement in just about three months, and then we'd move to summary judgment. So I just say that just to put a placeholder down that we think that if this is something the Court would entertain, we could actually get it done faster depending on the plaintiffs' view of what they actually need to take on that issue.

But to give you a little background here, we were looking at the case and it's a very complex case. It's become apparent, as we've taken a bunch of discovery before the stay and if plaintiffs have taken the discovery of the defendants, that there are a lot of issues in the case. There are 21 different plaintiffs, there are six individual doctor defendants, and we started to think ahead to what we might have to complete. There is still a lot of discovery to go on of the plaintiffs. Each of them have their own medical history, their own issues. My colleague, Mr. Tuteur, is going to talk a bit about the IMEs, which of course is going to take some time to accomplish.

THE COURT: And which we've been talking about

for months.

MR. HOLT: We absolutely have, Your Honor. And we started to think about how we would ultimately structure a trial, as well. And you asked about the trial time and I think that plays into this as well. We think it's going to be challenging for all the parties to figure out how to structure a trial with this many plaintiffs, each with individual stories. It's not a class. We have to deal with each individual plaintiff in their own situations.

And so we started to think about, is there a way we could kind of narrow this and conserve resources of the Court and the parties? Now, we know there are motions to dismiss pending and those may narrow the issues. We hope they will when the Court decides them.

But the other option we considered was, is there a way to get at the one common issue in this case that cuts across all the plaintiffs? And that would be whether the unlawful agreement that's alleged in the complaint actually exists. And there is certainly still discovery of the defendants to do, but a number of defendants have been deposed. Most of the defendants have completed their document productions. And we're not seeing any evidence at all to support the

allegations in the complaint of this unlawful agreement. I know the plaintiffs will want to take more and they are entitled to do that. But our thinking is that this structure would allow us to get to that issue quickly, which is dispositive.

If summary judgment is successful on whether there is an unlawful agreement or not, the case is done. And Mr. Egdorf mentioned that this schedule assumes that the motion will be successful. It doesn't. Of course, even if the motion was denied, that would be important information for the parties, as well, in evaluating their claims going forward and looking at this.

THE COURT: That's true, but you're also talking about many more months of delay in getting the case resolved and, I would think from the defendants' perspective, enormous expense.

MR. HOLT: Well, I think the expense is going to be there -- you know, under one scenario where the motion is successful, all the parties, including the defendant, avoid the additional burden of deposing the remaining plaintiffs, dealing with the IMEs, and a lot of third-party discovery that's still to go on of treating physicians and other parties who may have relevant information, as well as expert discovery. So

there's a lot of potential to avoid those expenses for everyone and avoid taking up the Court's time with disputes over IMEs, for example, and other discovery issues.

THE COURT: Mr. Holt, how many plaintiffs remain at this point -- individual plaintiffs?

MR. HOLT: I believe it's still 21.

THE COURT: What do you anticipate defendants' discovery of those plaintiffs will be?

MR. HOLT: Well, we have gotten documents from most of the plaintiffs. I believe there are still documents to be produced. There certainly are some follow-up requests that we have for plaintiff. There have been a number of depositions that have been gone on of the plaintiffs, but many of them still elect to be deposed.

THE COURT: How many? Do you know?

MR. HOLT: You know, I actually don't have the number of that.

MR. EGDORF: I believe it's four, Your Honor.

THE COURT: Four remain to be --

MR. EGDORF: That's my recollection.

MR. HOLT: *(Addressing co-counsel)* Is that right?

MR. TUTEUR: Half a dozen.

MR. HOLT: Half of those remain to be deposed.

THE COURT: All right.

MR. HOLT: And some of them do have -- you know, the plaintiffs have told us that some of them have medical issues that makes deposing them complicated in terms of scheduling and the --

THE COURT: Of the remaining four, a half dozen?

MR. HOLT: Yes, correct, Your Honor. And then there will be discovery of treating physicians who treated these plaintiffs, as well as a number of other third parties -- I believe from both sides that are looking at third-party discovery. And then again expert discovery, of course, which, you know, there may be some expert discovery focused on the unlawful agreement, but much of the expert discovery is going to be focused on the plaintiffs and their side of the equation.

So our thought, Your Honor, was to structure this in a way that we could get to that issue quickly. It will, of course, push back the overall schedule, if the motions are unsuccessful, several months. That's accurate, but it does get us there quickly and it gives us the opportunity to deal with that and conserve resources on a pretty expedited basis.

And I will say, you know, this may sound a little bit unorthodox, but it's actually a common approach in cases like this, particularly antitrust and RICO cases. I've pulled up a few examples that I've found where Courts have done this very thing.

There is a case, *In Re: Domestic Drywall Antitrust Litigation.* That's in the Eastern District of Pennsylvania and it's 163 F.Supp. 3d, 175. And actually, the very same thing happened. The defendants proposed, "Look, let's just get to the issue of agreement quickly. We don't think there is anything here. We can do that on an expedited basis and potentially save a lot of time and trouble." The Court ordered that and they got the summary judgment. And I believe the summary judgment motion was successful in part, but not in full, and so several defendants were dismissed as a result.

Another case, *Rebel Oil vs. Atlantic Richfield.* That's out of the District of Nevada. It's 133 F.R.D. 41. That one was a little different. It was an antitrust case. What the Court did there, because it was a monopolization case, the Court decided to focus first on relevant markets and entry barriers. So it wasn't the agreement issue, but it was a similar concept, and then go to summary judgment on that.

And then there is an EEOC case in the Southern District of Texas, *EEOC vs. Lawler Foods*, 128 F.Supp. 3d, 972. And although that's not an antitrust case, the Court there agreed that under Rule 26 it made sense to bifurcate discovery and focus on the determinative issue in the case and see if that resolved things before going forward with much more burdensome discovery and a challenging trial if they ever got there.

So, Your Honor, a Rule 26 clearly gives you the ability to structure discovery in a way that would be efficient for the parties and for the Court, and we think this would be a preferable way to go.

THE COURT: Okay, thank you.

Anything further, Mr. Egdorf?

MR. EGDORF: Just briefly, Your Honor.

Your Honor, as counsel I think had to admit, unless they are successful, this case is going to cost more money and take more time -- a lot more time.

One other aspect I do want to raise. You know, we still are missing documents from a number of the defendants. Even under their proposal, we're not going to get the documents until the end of February. I don't know what's going to be in those documents, I

don't know what discovery fights we're going to have about whether we've gotten all the documents. Until I take the corporate rep depo, I don't know if I'm going to need another Anthem person or whatnot. The notion that we're going to compress that and get that all done quickly, I think, is somewhat hopeful thinking. And that's why in the regular scheduling order we built in time to make sure all the parties can get deposed, and that schedule has been agreed to. I don't see any reason why we can't do that. It's going to be the most efficient way to resolve this case.

THE COURT: Okay.

MR. AUSTIN: Your Honor, this is Earl Austin. I haven't actually spoken at any of these hearings, but as I come at this, my experience is a little bit different than the lawyers here. For 30-plus years, I'm done mostly pharmaceutical products cases, so I've seen cases like this, MDL cases where you have plaintiffs from all over the country that have been brought together. Whether it manifests itself in bifurcation or in some other way, I think it's going to be impossible to try 21 or 18, whatever, plaintiffs in one trial in this case. And I think we would be remiss as counsel if we don't really look candidly and pragmatically at what's involved in this case.

The Court effectively has a mini-MDL in front of it. These plaintiffs have come from all over the country and you [have] them in front of you. Yes, we maybe have a half dozen plaintiffs to depose, but there is more to it than that because some of the plaintiffs, as you know from the IME motions, some don't even -- there's a dispute whether they even have Lyme.

So there is going to be a group of plaintiffs that were we to try their claims, which obviously we would, the issue would be do they even have Lyme in the first place. And in order to try that issue, in a typical MDL, those plaintiffs would probably be put off in a separate group. Because in order to look at that issue, we have to go to their treating doctors. If they don't have Lyme, well, then what do they have? There has to be some explanation for what they have. And the trial would end up focusing a lot on for each individual plaintiff what else is in the medical history that's going to account for that. I think we would have to try, devote a significant portion of any trial to dealing with that issue for those plaintiffs.

We have other groups of plaintiffs who, yes, they may well have Lyme, but they never actually

got or sought the treatment that's at issue here, which is the antibiotic or long-term antibiotic treatment. They never requested it, they never sought it. We would have to explore what's their causation if they never actually thought the treatment that they are claiming we withheld.

And then there is the third group of plaintiffs who did have the treatment. They had different outcomes. Some of them it didn't work, they never got any better. Some of them, they had some serious side effects. The point is, none of these cases is going to look alike, and in a typical MDL these plaintiffs would be carved up into different groups. I won't say it's never happened, but I will tell you, the most cases, most plaintiffs I've ever tried in one case was five and they were selected because they all took the same product, they all had the same injury, and we were able to focus in on causation.

And the other issue here is we don't really even have the same products. I guess they have their guidelines that they developed and they have six doctors that have been sued and presumably would want to come in and be entitled to explain why they did what they did and they would be subject to cross-examination.

That's going to take some time.

But my policy at Aetna is not the same policy. We don't follow the IDSA guidelines by rote. They put limits on oral antibiotics. We don't. They allow one or recommend one course of IV antibiotics. We allow two. United is going to be different. Anthem is going to be different. We're going to have trials on those. So in some sense we don't even have the same products for every plaintiff. Some were Aetna members, some were not.

And even if we took the time that it took to try that case, it's going to be very difficult for a jury to follow 21 different plaintiffs and remember, this plaintiff was an Aetna member and Aetna's policy was this, and they either have Lyme or they don't, and they either requested the treatment or they didn't. It was paid for or it wasn't.

I think -- I just think with whatever decision we make, and it may not be a decision we can make today, I don't think it's reasonable to think that we're going to be able to try 21 plaintiffs in 15 days, or frankly even 30 days. And I think we would be remiss in not putting that out on the table in some context.

The reason for the bifurcation, it

doesn't matter what Aetna's policy is versus United, it doesn't mater whether they have Lyme or not, it doesn't matter whether they sought the treatment or not, it doesn't matter their individual limitations cases if there is no conspiracy. If there is no conspiracy, all of the rest of this doesn't matter. Yes, we only have half a dozen plaintiffs to depose, but we don't need to depose any treaters. We don't need to go depose -- each of these plaintiffs may have five or six treaters that we would have to depose. We don't have to do that.

The only reason we have had the bifurcation schedule back November is 90 percent of the discovery that's going to happen under our proposal is plaintiffs that are going to do discovery from us. We don't need to do discovery from the plaintiffs on the conspiracy theory. So, if he thinks that he can do this discovery from us as soon as November, we're fine. I realize he says he needs our documents and he'll want to look at them and take a look --

THE COURT: I was under the impression most of the documents have been produced.

MR. AUSTIN: Aetna has produced theirs. I think it's mostly IDSA, it's the emails, because -- I won't speak for them, but my understanding is the

doctors no longer work at these institutions and they haven't always had control of the emails. But I think -- and the stay has been productive in that one sense, but Mr. Dunn can confirm, but I think that there is a process for now for pulling that together.

But my point is, under bifurcation, we'd really be looking at almost a one-way street on discovery because we don't need any discovery from the plaintiffs, we don't need discovery from a bunch of third-party treaters.

So, yes, he is correct that it's going to push things down the road, but I think it's unreasonable to think that this isn't going to get pushed down the road anyway when we confront the issues of what it's going to be like to try 21 disparate plaintiffs.

THE COURT: Well, Mr. Austin, what exactly -- I mean, I understand at the end you sort of wrapped around and made an argument that bifurcating discovery makes sense here, but what exactly is it you are proposing about how we try the case?

MR. AUSTIN: Ultimately?

THE COURT: I mean, I guess I'm trying to understand where you're coming from. These are issues that no one has ever raised before.

MR. AUSTIN: And I --

THE COURT: No motion has ever been filed, it's never been presented. You've made a number of arguments here today that, frankly, are quite new to me.

MR. AUSTIN: And I will take part of the collective blame for that.

THE COURT: It actually strikes me that you all have finally figured out this case might actually have to be tried.

MR. AUSTIN: We are certainly thinking about that.

THE COURT: That's a good idea since the case was filed in 2017.

MR. AUSTIN: And I will take part of the corrective blame because I don't think the parties have been realistic about what this case involves and I think we need to be pragmatic before the Court. Because even setting aside the time and expenses that the parties spend, the Court's ultimately going to have to try something and I think we need to be pragmatic about what that trial is going to look like. So I'll take some blame. We should have done it earlier, but I guess I would fall back on better late than never.

So, setting aside the bifurcation issue, let say that we go under a typical schedule and we do

all the discovery that we need. I think the Court is going to have to look at some mechanism to call out common issues perhaps that apply to everybody, which we think their conspiracy issue is the prime. The conspiracy issue is the prime example of the issue that cuts across -- even if we were looking at trial today and discovery was done, I think we would be having a candid discussion about can we really try a case with 21 individual plaintiffs or is there something we should be carving out?

Even once we get down among the individual plaintiffs, they are going to fall into groups. The ones that there is at least a dispute over whether they have Lyme, that's going to be a different looking trial than the plaintiffs where it's not in dispute that they have Lyme and it's merely did they ask for the treatment and did the treatment work, et cetera. That could be a different group of plaintiffs. I just think these are issues, unless we look at a six or eight week trial, that we're going to be having to confront down the read.

THE COURT: Well, it seems to me that some of those arguments are best made on summary judgment, and the place that you are in a better position to do that is after you have done your discovery.

MR. AUSTIN: I absolutely agree with the Court on that. And I will say that on that theme, summary judgments are going to be very complicated. They will be simple on the common issue. Was there a conspiracy is going to be a fairly straightforward issue. The evidence will be what it is and it will cut across the case.

But then we're going to have -- for each individual plaintiff, we're going to have limitations issues, we're going to have damage issues, we're going to have causation issues, we're going to have deposition testimony or declarations perhaps from treating physicians. 21 different times with 21 different stories.

We're looking at very complicated summary judgment motions that are going to result from the discovery and it's going to be a lot -- it's going to be the IME motion magnified by at least 21-fold that the Court is going to have to consider. And I think any schedule that gives the Court a month to do that before trial is not realistic.

And as I said, whether it manifests itself in bifurcation or in some other way, I do think that the schedule is going to have to acknowledge that these are 21 complicated individual cases and the Court is

going to have to have time to assess them, whether it's we suggest bifurcation now or let's do all the discovery in the ordinary course, but then recognize that it may be not realistic to think that we're going to do a 21-plaintiff trial a month after the summary judgment motions are filed. And I think it's fair -- I just think it's pragmatic to flag that. We should have done it earlier --

THE COURT: Thanks for bringing it up.

MR. AUSTIN: -- and I'll take the blame for it.

THE COURT: Thank you, Mr. Austin.

Others on the defense side want to speak to that issue? Mr. Egdorf, do you want to respond?

MR. EGDORF: I'll just be very brief, Your Honor. You know, again, this whole idea of bifurcation started with efficiency, and now Mr. Austin is talking about we're going to have five or 10 or 20 separate trials. Certainly, trials happen with 20 plaintiffs. Mr. Lanier just tried 20 plaintiffs against Johnson & Johnson with different forms of cancer regarding their baby powder and they did that trial in less than a month. So it's not like it can't be done.

If the real goal is efficiency, everything they are proposing goes against that. Everything they are doing is posited under the notion of you are going

to grant our motion and that way it will be faster and cheaper. If you don't assume you're going to grant their motion, we just made a more expensive, lengthy and, according to what Mr. Austin is proposing, years of this litigation to get all these cases tried. That doesn't make any sense.

Thank you, Your Honor.

THE COURT: All right. We're going to get to the IME motion, Mr. Tuteur. I think you're going to argue that. I want to hear about that. I do expect, frankly, to ask the parties to brief that issue, and perhaps you all have actually proposed a briefing schedule on that.

But here's my point. My point is, I want you to brief this bifurcation issue. It's not something I've really had much time to think about. Mr. Austin has introduced some issues that are new to me and I think the better thing to do is to get that issue briefed up. And the schedule that the parties agreed to with respect to briefing on the IME certainly works well, at least the timing. You all will not be in a position, obviously, to file anything by February 7th, so we'll talk about that.

MR. EGDORF: Yeah. And, Your Honor, you asked about the IME. I'm not sure if there is something to

discuss on that or not. We have a disagreement about who the new doctor is going to be. We've agreed to a briefing schedule to present that to the Court. So I'm not sure there's -- unless the Court wants more information, I'm not sure if there is anything else really to be said about it. We've agreed to a schedule to present it to the Court.

THE COURT: Okay, anything else, Mr. Tuteur?

MR. TUTEUR: If the Court is acceptable to the schedule, I think --

THE COURT: The schedule is fine, the schedule is fine.

MR. TUTEUR: I don't know that I have anything more --

THE COURT: Thanks, that's fine. That's perfectly fine. So the motion will be filed by February 7th and opposition on the 18th and a reply on February 24th.

If I ask you to brief the bifurcation issue, what would be a reasonable briefing schedule for that? Mr. Holt?

MR. EGDORF: Is your assumption with that, Your Honor, that the defendants will file the motion or a brief requesting it, and then we will respond, or do you want --

THE COURT: No preconceived ideas about how we brief it.

MR. EGDORF: I was just trying to think of the schedule, if the idea is we're both going to file something at the same time, or they're going to file their request and then we respond to it, which seems to make more sense to me.

MR. AUSTIN: I would think it makes sense for us to --

THE COURT: That's fine. How much time?

MR. AUSTIN: Two weeks to get ours on file and then --

THE COURT: Two weeks from today.

MR. EGDORF: And then presumably a couple weeks to respond.

THE COURT: All right. We'll put a schedule out that adopts a briefing schedule like that. Two weeks from today, two weeks to respond, and seven days after that to reply. Fair enough?

I had come in here, frankly, with the plan to make a decision about this today, but I just think it's probably better briefed up.

All right, what else?

MR. DUNN: Your Honor, Alvin Dunn. We did flag in the joint report one final issue --

THE COURT: Okay.

MR. DUNN: -- regarding non-retained experts, and we could discuss it right now.

THE COURT: I knew there was a third thing.

MR. DUNN: It's not immediate because the plaintiffs have designated two retained experts and six non-retained experts and have let us know they want to go ahead and take the depositions of three of the non-retained experts. We have a dispute as to whether they are truly properly designated as non-retained experts or whether, as defendants contend, based on their description of their expected testimony, they are actually retained experts and neither provide a report. The Rule 26 is clear that if it is an expert who's required to provide a report, you have to provide the report before the deposition.

So, Your Honor, I think what makes sense is just flag it for you and we could brief it in the ordinary course as soon as the stay is lifted and just according to the normal court schedule, because I haven't heard any urgency on the plaintiffs' side for the need to take the depositions. They haven't set dates or whatever. It's just something that we think should be decided by the Court before we have a situation where we would take a deposition and be

exposed to having a second deposition, which is what we want to avoid.

THE COURT: Thanks, Mr. Dunn.

Mr. Egdorf?

MR. EGDORF: I'll try to be brief, Your Honor.

First of all, we've been trying to take those depositions for some time and we've asked for dates, particularly for Dr. Donta for some time, and each time we get rejected. So the notion of we haven't asked to do this or any urgency isn't true.

Secondly, we don't have a current expert deadline, obviously. What happened back then is we were never allowed to take these depositions, and I'll explain in just a second what these people really are. So, out of an abundance of caution, not knowing what they were going to say, we listed them as non-retained experts because these are physicians that are involved in the Lyme field -- and in particular, Dr. Donta, who is a major issue for us.

THE COURT: Are they treating physicians?

MR. EGDORF: Well, they are not for our plaintiffs, Your Honor. So Dr. Donta was a member of the IDSA. He was on the Lyme Committee. He got kicked off the Lyme Committee because he didn't agree with what the IDSA was doing. And we want to take his

deposition to find out about that.

THE COURT: Well, is he a fact witness, then?

MR. EGDORF: I think he's primarily a fact witness.

But for argument sake, Judge, I'd say, "Dr. Donta, why did you tell the IDSA they were wrong to have the Lyme guidelines?"

And he'd say, "Well, the literature says dada, dada, dada, dah."

I'm now going to get told, "Well, you're trying to offer expert testimony from him."

So that's why we designated in the way we did. I haven't paid him, I haven't hired him, I can't make him write a report. He doesn't write a report like this in the ordinary course. I don't know what he's going to say. But if he gives answers that arguably touch on expertise, then arguably I'm going to have to name him as a non-retained expert or a hybrid or however you want to refer to it.

But I'm not going to know what he's going to say until I take his deposition. So what I want to do is take his deposition. If he has something, opinions that sound like expert things, then when I have a deadline, I'll make the decision, do I want to designate him as a non-retained expert? If he's

non-retained, I have to give a disclosure. I don't have to give a report.

THE COURT: You have to give a summary of the facts, summarize the opinions on which he's expected to testify.

MR. EGDORF: In the disclosure, which frankly I'm going to know because he's going to say it in the deposition, because that's the only way I'm going to know what those opinions are. I mean, I want to get his fact answers, his fact discovery. If it turns out that touches on expert stuff and I need to make a disclosure, I will. And that's where we are with that.

THE COURT: Well, I think Mr. Dunn's concern is that you're basically doing that after the fact and that the rules require you do that before the deposition. Is Mr. Dunn not correct about that?

MR. EGDORF: Well, there's two things:

One, I don't know what his opinions are, so I can't disclose them.

The second thing is, Mr. Dunn, if I do disclose him as an expert, can take his deposition again on those expert issues.

But it's up to me to decide if I'm going to make him an expert or not. I don't have an expert deadline or disclosure right now. I want to take this

man as a fact witness. And if he turns out he has expertise or they argue what he says is expertise, I'll name him and then we do expert discovery like we ordinarily would do, and they will have that information before they take that deposition. Or if they don't get to take it, then you'll rule whether I get to use that expertise or not. But either way, I need the fact information.

And it is a pressing issue because he was on the IDSA. He got kicked off for these very issues. He's somebody I've got to depose. Whether we have bifurcation or not, he's somebody I've got to depose.

THE COURT: So, Mr. Dunn, under Mr. Egdorf's hypothetical here, is that witness a fact witness or is he an expert witness?

MR. DUNN: Your Honor, I think he's proposing him as both. And it would be inefficient to take his deposition twice.

If you look at their disclosures, they did give us descriptions in their disclosures of these three that they want to depose. And when you read them, to me it leads like four expert testimonies. Dr. Liegner is the second one that they want to depose. Dr. Liegner has expertise regarding chronic Lyme disease, treating chronic Lyme disease, how health

insurance companies cover and do not cover chronic Lyme disease, et cetera, et cetera. And I believe the same disclosure they gave us concerns Dr. Donta and the other one that they want to depose, Dr. Burrascano. And those are four expert questions for which a report is required.

The law says, yes, if you're a treating physician and you saw Lisa Torrey, then that's a non-retained expert and that's more like a fact witness. However, if you're testifying as an expert opinion regarding standard of care, which is really what this is all about, you are required to give a report before the deposition, and the law says whether or not you paid them, and that's what the rule says and that's what the cases say and that's what we'd like to brief for Your Honor before the deposition.

THE COURT: Fair enough. It needs to be briefed. Again, I think that's something that we are just going to have to look at a little more carefully.

MR. EGDORF: One issue I forgot to raise. Dr. Donta is extremely elderly, so it's really important we figure this out promptly.

THE COURT: Okay. Mr. Dunn?

MR. DUNN: As soon as the stay is lifted or as soon as the Court would like to set briefing

deadlines. It seems like a standard schedule for a motion would be fine for us. So, as soon as he wants to set a deadline for us to file that motion, we'll file it.

THE COURT: Let me suggest this. I'm going to go back on something I said earlier in terms of briefing on the bifurcation issue. Instead of two weeks, could you all live with a week? I mean, all of the sudden we're five more weeks down the road under the schedule. Could you live with a week, Mr. Holt, and get a response in a week and then a reply in a week?

MR. HOLT: Yes, we could.

THE COURT: All right, fair enough.

Okay. I guess the last thing I'd say is, you know, there were some issues raised today by Mr. Austin, I think, that are thoughtful and provocative in a way. The parties are going to need to talk about a trial plan at some point. I think these are things probably we all should have been thinking about before now, but they are real issues and they are not going to go away. I don't know the best way to do that sort of mechanically, other than I would encourage the parties on both sides to be thinking about this.

And then I'll ask you, you know, to have discussions back and forth about what makes the most

sense in terms of going forward. If you all can agree, obviously, great. The odd of that, I think, are slim. And so at some point I think it makes sense for me to hear from both sides about what makes the most sense in terms of actually trying the case if we get to that point. But I think the bifurcation issue is more important than that at this point. And so let's get that issue briefed up. And then the IME issue, as well, and then the deposition issue -- or the non-retained expert issue.

What else?

MR. DUNN: Just to be clear on that, when would you like to see the motion on the non-retained experts?

THE COURT: We didn't resolve that. I guess the issue is when can it be filed?

MR. EGDORF: I'm not sure how you want to do it, Judge, whose motion it would be. I just want to take a deposition. In theory, they are looking to quash it. So it seems to me it's probably their motion saying why I can't depose this fact witness.

THE COURT: I think that's probably right.

MR. DUNN: It's a motion for a protective order --

THE COURT: I think that's fine. Could you do

that within a week?

MR. DUNN: I believe we could, Your Honor. It's the same deadline, so a week from today?

THE COURT: Week from today.

MR. DUNN: Yes, Your Honor.

THE COURT: Any problem with that or you can live with that?

MR. DUNN: No problem with that.

THE COURT: Okay, that's fine.

MR. DUNN: Just to be clear, I think you said that for the bifurcation, plaintiffs would respond in a week and then defendants would reply in a week?

THE COURT: That's correct.

MR. DUNN: Is that the same schedule you want for the other non-retained experts?

THE COURT: I think that makes sense if that works for everybody. And then we've got a shorter deadline or a more immediate deadline on the IME.

Are we all clear? What else?

MR. EGDORF: I think that's all for the plaintiffs, Your Honor.

MR. HOLT: That's all for the defense.

THE COURT: Okay, thanks to everybody for being here. Safe travels.

[10:45 p.m. - Proceedings adjourned]

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause.

/s/ Ed Reed — 2-7-20
Edward L. Reed — Date
Court Reporter